

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:99CR3043
	)	
Plaintiff,	)	
	)	
v.	)	ORDER ON MOTION TO PROCEED IN
	)	FORMA PAUPERIS AND NOTICE OF
JOHN EDWARD MULL,	)	APPEAL
	)	
Defendant.	)	
	)	

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On November 7, 2007, I signed a Memorandum and Order on Defendant's Rule 60(b) Motion, filing 618. I concluded that the Rule 60(b) motion added a new ground for relief and thus qualified as an application for habeas relief, saying:

This amounts to a collateral attack upon the defendant's sentence that could have been raised in the defendant's previously filed § 2255 motion. I must therefore treat the defendant's Rule 60(b) motion as a successive § 2255 motion. Because the defendant's motion is a successive § 2255 motion, I cannot consider his argument until he obtains the appropriate authorization from the Eighth Circuit Court of Appeals. See 28 U.S.C. § 2244(b)(3); United States v. Lambros, 404 F.3d 1034, 1036( 8<sup>th</sup> Cir. 2005) . . .

(Mem. and Order on Def.'s Rule 60(b) Mot., filing 618, p. 2).

No such authorization by the court of appeals has been shown to have been sought or received.

On November 28, 2007, the defendant filed a "Notice of Appeal and Motion to Proceed In Forma Pauperis," filing 619, and "Application to Proceed Without Prepayment of Fees and Affidavit," filing 620. The defendant seeks to appeal the "Memorandum and Order on Defendant's Rule 60(b) Motion," filing 618.

If my decision that the defendant's Rule 60(b) motion was a successive habeas corpus application is correct, then 28 U.S.C. § 2244(b)(3)(A) makes it clear that this district court shall not consider the Rule 60(b) motion until a court of appeals has authorized the district court to do so. It is appropriate that the court of appeals determine the propriety of my ruling; that may be done by an appeal to the court of appeals in forma pauperis.

Accordingly, the defendant's appeal may proceed in forma pauperis, but the claim within the Rule 60(b)(6) motion, filing 614, shall remain in the meantime dismissed.

IT IS ORDERED that the Motion to Proceed In Forma Pauperis, filing 619, is granted as is the Application to Proceed Without Prepayment of Fees, filing 620.

. Dated December 5, 2007.

BY THE COURT

s/ Warren K. Urbom  
United States Senior District Judge